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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF SOUTH CAROLINA, *et al.*,
Petitioners,

v.

CATAWBA INDIAN TRIBE OF SOUTH CAROLINA, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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STATEMENT PURSUANT TO RULE 28.1

The named defendant corporations by or on whose behalf this paper is filed, and each of their parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates, if any, are listed in the Supplemental Appendix to the Petition for Certiorari previously filed.

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INTRODUCTION

Petitioners seek review of a decision of an *en banc* panel of the Fourth Circuit in order to completely resolve the potentially dispositive issue of whether the application of state laws to this claim barred the action in its entirety when it was commenced in 1980. This Court should grant review to resolve this threshold issue and avoid leaving thousands of innocent landowners at continuing risk.

A. There Is No Reason To Delay Resolution Of The Question Of Whether The Court Of Appeals Complied With This Court's Direction On Remand.

In an effort to minimize the importance of immediate review, respondent asserts that current landowners will be unharmed by the decision of the Court of Appeals prolonging this litigation because, respondent predicts,

Congress will "certainly" pass settlement legislation.[1] In essence the Catawbas ask this Court to aid them in extracting a payment from Congress by causing continued economic disruption and hardship to the thousands of landowners affected by this litigation.

Contrary to respondent's assertion, the Court cannot assume that the federal government will fund a settlement of this claim, now or ever. The unsupported assumption that Congress will rescue the landowners by agreeing to pay millions of dollars[2] for settlement ignores history. As respondent itself points out, two earlier legislative proposals to settle this claim never passed Congress.[3] The Rhode Island and Maine settlement acts cited by respondent were enacted during the administration of President Carter and the administration of President Reagan was far less inclined to provide even modest federal payments to settle Indian claims against non-federal defendants.[4] The administration of President

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[1] Respondent's Brief in Opposition at 26-28 (hereinafter cited as "Brief in Opposition").

[2] The land at issue is highly developed and has been estimated to be worth more than a billion dollars. H.R. 3274, 96th Cong., 1st Sess. (1979). In 1979 the Catawbas sought 30 million dollars from Congress to resolve their claim. Hearings on H.R. 3274 Before the House Comm. on Interior and Insular Affairs, 96th Cong., 1st Sess. 30 (1979).

[3] Brief in Opposition at 28, n.23.

[4] For example, the Connecticut settlement legislation cited by the Catawbas as an example of a federal rescue was originally vetoed by President Reagan, who, in his veto message, declared that it was the administration's policy to pay no more than half of any settlement of Indian land claim litigation against a state and private parties. President's Message to the Senate Returning S. 366 Without Approval, Cong. Rec. S4154-55 (1983). The Connecticut settlement legislation was subsequently amended and approved after the State of Connecticut agreed to contribute additional land and special services. The federal contribution amounted to less than one million dollars. Connecticut Indian Land Claims Settlement Act, 25 U.S.C. §§ 1751-1760 (1982).

Bush has opposed the most recent Indian land claim settlement legislation to come before Congress.[5] Moreover, there are indications that the present administration is opposed to federal intervention in this case.[6] The impropriety of a strategy which relies upon a legislative resolution of this claim was recognized by Judge Murnaghan in his concurrence in the decision previously reviewed by this Court:

> I take little solace in the consideration that a proper, fair and equitable result *may* possibly come about by reason of enlightened, but by no means mandatory, legislative or executive action. Such a posture would still leave too many innocent good faith landowners at an awesome risk that political realities related to efforts by both sovereigns [*i.e.*, United States and South Carolina] to right a long standing wrong, might lead to the Queen of Spades ultimately winding up in the hands of the individual owners.

Catawba Indian Tribe of South Carolina v. *State of South Carolina*, 740 F.2d 305, 306 (4th Cir. 1986) (emphasis in original).[7]

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[5] On May 18, 1989, the Administration announced opposition to H.R. 932, 101st Cong., 1st Sess. (1989), which would require a federal contribution to implement a proposed settlement of land claims asserted by the Puyallup Indians. According to the announcement, the bill was objectionable, *inter alia*, because "there is little risk of Federal liability with regard to any claims related to the settlement. . . ."

[6] On May 3, 1989, the Honorable John M. Spratt, the Congressional Representative from the district which includes the land at issue herein, was quoted as follows:

> The Office of Management and Budget, the Interior Department, and the Bureau of Indian Affairs take the position that the federal government dissolved its relationship with the Catawbas long ago, and therefore will not prosecute or get involved in any way.

States New Service, Nexis.

[7] The Catawbas' apparent reliance upon this opinion of Judge Murnaghan to suggest that years from now some court might apply

B. The Court Of Appeals Disregarded This Court's Mandate To Apply The Laws Of South Carolina Including Its Statute Of Limitations To The Respondent In The Same Fashion As To Other Citizens.

The Catawbas' most inflammatory argument is that the defendants misconstrued the basis of the Court of Appeals' decision in order to "distort" the language of the Court of Appeals and "mislead" this Court. (Brief in Opposition at 8). To the contrary, the defendants fairly presented the basis and the language of the decision, and that decision contravenes this Court's mandate that the statute of limitations be applied to the Catawbas in the same fashion as to other citizens.

In Section IV of its decision, the Court of Appeals addressed the defendants' argument that the Catawbas have equitable, not legal, title because Indian title is inalienable. The Court of Appeals began its analysis by considering this Court's decisions on Indian title. After analyzing six such decisions,[5] the Court of Appeals opined that "[t]hese precedents establish that as a matter of federal law, for the purpose of recovering possession of real property and damages against any defendant other than the United States, Indian title is equivalent to fee simple absolute title. It is legal title." (A. 15); *Catawba Indian Tribe v. State of South Carolina*, 865 F.2d 1441, 1451 (4th Cir. 1989).

None of those cases holds that the Catawbas' claim to recover land is the equivalent of legal title. Nonetheless,

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equitable principles and not grant the Catawbas the relief their own complaint seeks is disingenuous. The complaint prays for possession and trespass damages as to all 27,000 parcels of land in the claim area and has never been amended; nor have the Catawbas ever otherwise conceded that they do not seek possession of all of the claimed land.

[5] *Oneida Indian Nation of New York State v. County of Oneida, New York*, 414 U.S. 661 (1974); *United States v. Tillamooks*, 329 U.S. 40 (1946); *United States v. Shoshone Tribe*, 304 U.S. 111 (1938); *United States v. Kagama*, 118 U.S. 375 (1886); *Mitchel v. United States*, 34 U.S. (9 Peters) 711 (1835); *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823).

the Court of Appeals reasoned that *federal policy* would conflict with a finding that Indian title was equitable, rather than legal, title *under South Carolina law*:

> The argument that the Catawbas have equitable title precluding the tribe from invoking the presumption afforded by section 15-67-210 conflicts with the policy of the United States and the Nonintercourse Act. This policy and the Act protect Indian tribes in their rightful occupancy of their lands. To use the trusteeship created by the Constitution and implemented by the Act to defeat a tribe's right of occupancy would indeed be ironic and unjust.[9]

The Catawbas seek to relegate this centrally important portion of the Court of Appeals' opinion to *dictum*. However, a fair reading of the opinion indicates that this section is critical to the Court of Appeals' holding.[10] The Court of Appeals squarely relied on its perception of the policy of the United States as embodied in, for example, the Nonintercourse Act to conclude that the Catawbas may (or indeed must) be afforded the presumption South Carolina grants to those who possess legal title. Having so concluded, the Court of Appeals went on to hold that this legal title entitled the Catawbas

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[9] A.15; 865 F.2d at 1451. The Catawbas' complaint that the Court of Appeals' opinion was improperly excerpted is wholly without merit. The Petitioners did no more than modify the first sentence of the quoted section to make clear the relationship between "legal title" and the application of the statutes of limitation. There can be no doubt that, had the Court of Appeals held that Indian title is mere equitable title, the Respondent would have been precluded from invoking the presumption of section 15-67-210 and that, as the defendants said in their petition, the statute of limitations would have applied to the Catawbas' claim.

[10] What arguably is dictum is the section of the opinion immediately following the above quoted language on the possible constitutional ramifications of a decision that the Respondent possesses equitable, rather than legal, title. In this instance, having raised the constitutional question, the Court of Appeals went on to state that "we need not address these constitutional issues . . ." (A. 15); 865 F.2d at 1451.

to the presumption of possession of section 15-67-210 to avoid the ten year statute of limitations of section 15-3-340.

By relying on its perception of federal Indian policy to conclude that Indian title equals legal title under South Carolina law, the Court of Appeals unquestionably failed to honor this Court's mandate to apply the South Carolina statute of limitations to the Catawbas in precisely the same fashion as it applies to others. (A. 63); *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986). This Court did not remand for a determination of what federal policy suggests South Carolina law should be, but for a determination of what South Carolina's law is when applied to the Catawbas in the same manner as to other citizens.

C. This Court's Prior Decisions Establish That Indian Title Is Not Legal Title.

The Catawbas do not attempt to distinguish the three decisions the defendants rely on in support of their position that South Carolina, or its grantees, have exclusive title to the land at issue, and that the respondent, by virtue of its presumed Indian title, possesses a mere right of occupancy to the property. (Petition at 12-15). Instead, they offer a series of uncontroverted observations about the nature of Indian title, an unsupported assertion about the nature of fee title, and a misleading reference to a distinction between aboriginal Indian title and Indian title that has been recognized by a sovereign.

The Catawbas assert that Indian title is "sacred" whether a tribe holds aboriginal or recognized Indian title, and that recognized Indian title is a property right that cannot be extinguished by the United States without just compensation. (Brief in Opposition at 22-23). Whatever may be the merits of those assertions, none has any bearing on the issue of whether Indian title is legal title under South Carolina law.

The Catawbas then assert that fee title "does not confer present possessory rights in lands subject to Indian title." (Brief in Opposition at 24). The Catawbas' emphasis on possessory rights wholly misses the point. The issue is whether the Respondent has legal title to the property under South Carolina law, and this Court has stated that the sovereign, or its grantees, have "exclusive" and "clear" title to the property. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 574, 584-85 (1823).[11]

D. The Respondent's Argument Repeats The Court Of Appeals' Misinterpretation Of State Law.

The petitioners have shown that the Court of Appeals' mistaken focus on federal Indian policies led it to misinterpret state law. The Court of Appeals improperly presumed the timeliness of the Catawbas' claim by presuming the merits of the claim, an error of logic that makes the statute of limitation virtually meaningless and undermines the state's strong policies requiring the recordation of land titles and favoring stability and repose in land transactions. Rather than addressing these arguments, the Catawbas' response repeats the faulty reasoning of the Court of Appeals.

This confusion between the merits and the timeliness of the Catawbas' claim is reflected in the respondent's discussion of state law. For example, their brief discusses at length two cases [12] which, the Catawbas suggest,

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[11] The Catawbas' argument also fails to grasp the unimportance of the distinction between recognized and aboriginal Indian title in the present context. (Brief in Opposition at 23, n.18). Having stated that such a distinction exists, the Catawbas do not attempt to explain the relevance of this distinction. In point of fact, there is no distinction between recognized and aboriginal Indian title in the present context. The cases relied upon by the Petitioners to establish the contours of Indian title and fee title apply equally to property as to which either recognized Indian title or aboriginal Indian title is asserted.

[12] *Thomas* v. *Daniel*, 13 S.C.L. (2 McCord) 354 (1823); *Hawkins' Devisees* v. *Arthur*, 2 S.C.L. (2 Bay) 195 (1798).

hold that interests of the sort asserted by them are "enforceable titles at law, superior to ordinary grants and paper title." (Brief in Opposition at 17-20). But the issue now is not whether, on the merits, the Catawbas' claim is enforceable against the thousands of landowners who possess the land under record title. The issue is whether the Catawbas, having been out of possession and having delayed in bringing their case for more than a decade after the effective date of the Catawba act, are barred from asserting their claim under S.C. Code Ann. § 15-3-340, or may take advantage of the exception embodied in S.C. Code Ann. § 15-67-210 for claimants who have "legal title."

Indeed, only one of the South Carolina cases discussed by the respondent at pages 17-22 of their brief, *Haithcock* v. *Haithcock*, 123 S.C. 61, 115 S.E. 727 (1923), involves the application of the limitation statute, and that case does not support the application of the "legal title" exception under section 15-67-210 to save the Catawbas' claim. Referring to the presumption of possession flowing from legal title, the *Haithcock* court charged that "under the law, if one shows paper title—a deed or will or legal paper title of any kind, to land—then the law presumes that he was in possession . . ." *Id.*, 123 S.C. at 69, 115 S.E. at 729. The crux of the Catawbas' claim is not that they have title under some arguably valid but unrecorded paper title; to the contrary, the Catawbas' present claim to recover possession of the land is predicated on the alleged invalidity of the paper title transferred by the Treaty of Nation Ford.

If the Catawbas' claim is viewed without reference to their purported status as an Indian tribe, there can be no doubt that the claim is barred by the statutes of limitation. The Catawbas are claimants who remained out of possession of the land for more than ten years before bringing suit. Their claim is not based on any recorded instrument which might have put the landowners in pos-

session on notice of the claim or to which the landowners' possession could be presumed to be subordinated. Indeed, the crux of their claim is a challenge to the validity of the "legal title" as recorded in the land records of South Carolina. Accordingly, they were required, the same as any other South Carolina citizen, to assert their claim within ten years.

CONCLUSION

For the reasons set forth above and in the Petition previously filed, this Court should grant review to compel the Court of Appeals to comply with this Court's earlier decision.

Respectfully submitted,

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